In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-144

EFRAIN T. SUAREZ, ET UX., PETITIONERS

v.

LOUIE L. WAINWRIGHT, DIRECTOR, DIVISION OF CORRECTIONS, STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision below holding that they were not entitled to an award of attorneys' fees and costs incurred in litigation against state and federal officials.

The pertinent facts are as follows: The Commissioner of Internal Revenue determined income tax deficiencies and negligence penalties against petitioners for 1963 and 1964. The deficiencies were based upon evidence obtained by the Internal Revenue Service from officers of the Miami, Florida, Police Department (Pet. App. II 5). Upon review of the deficiencies, the United States Tax Court determined that

593-422—75——1

the seizure of the evidence, upon which the asserted deficiencies were based, violated petitioners' rights against unreasonable searches and seizures (Pet. App. II 15), and expunged the asserted deficiencies (Pet. App. II 26–35).

While their case was pending in the Tax Court, petitioners commenced this action in the United States District Court for the Southern District of Florida against various state and federal officials [1] to recover the attorneys' fees and expenses incurred in the Tax Court and in this action (Pet. App. I 21–24). The district court held (Pet. App. I 37–38) that the federal respondents were acting within their authority in investigating and determining petitioners' correct tax liability, and that the action was an unconsented suit barred by sovereign immunity. Alternatively, the court held that the action was barred by the statute of limitations. The court of appeals affirmed (Pet. App. I 1–5).

1. The decision below correctly held that petitioners' action against the federal respondents was barred by sovereign immunity. This Court has on many occasions reaffirmed the general rule that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration" (*Land* v. *Dollar*, 330 U.S. 731, 738). See also *Larson* v. *Domestic & Foreign*

[1] The federal officials named in the complaint (Pet. App. I 13) were the Attorney General, the Commissioner of Internal Revenue, and various other officers and employees of the Internal Revenue Service and "each of the said named individuals' successors and subordinates."

Corp., 337 U.S. 682, 704; *Dugan* v. *Rank*, 372 U.S. 609, 620. Although the named defendants are the Attorney General and the Commissioner of Internal Revenue, "it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign" (*Larson* v. *Domestic & Foreign Corp.*, *supra*, 337 U.S. at 687).

Here, petitioners are not suing the named federal respondents in their individual capacities but are seeking expenses incurred as a result of certain actions those respondents took in their official capacities as administrators of the federal tax laws. Thus, absent congresional consent to such a suit, it is barred by sovereign immunity. There is, however, no such consent. As the district court correctly observed (Pet. App. I 38), the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, contains a special exception for "any claim arising in respect of the assessment or collection of any tax * * *" (28 U.S.C. 2680(c)).

2. Petitioners' claim (Pet. 20) against the federal respondents under the Civil Rights Act, Rev. Stat. Sections 1979 and 1980, 42 U.S.C. 1983, 1985, is similarly defective. Section 1983 is inapplicable because it is limited to deprivations of constitutional rights made under color of state law. See, *e.g.*, *Williams* v. *Rogers*, 449 F.2d 513 (C.A. 8), certiorari denied, 405 US. 926. Here, however, the purported constitutional deprivation by the federal respondents was the determination of income tax deficiencies against petitioners under federal law. Section 1985,

which creates a civil action for various conspiracies to interfere with the civil rights of a person or class of persons, is also inapplicable to petitioners' claim. See, *e.g., Koch* v. *Zuieback,* 316 F.2d 1 (C.A. 9) See also *Griffin* v *Breckenridge,* 403 U.S. 88.

Contrary to petitioners' argument (Pet. 19–20), *Bivens* v. *Six Unknown Agents,* 403 U.S. 388, does not support their claim for attorneys' fees and costs. In *Bivens,* the Court held that a cause of action for damages arose where an individual's Fourth Amendment rights had been violated by federal officers acting under color of their federal authority. Here, however, the federal respondents took no part in any violations of petitioners' rights which may have been occasioned by the search and seizure conducted by the local police (see Pet. App. II, 5, 19, 21).

Nothing in *Bivens* suggests that damages might be awarded against a federal official who was not connected or involved with the unconstitutional intrusion and whose only actions were accepting evidence from the local police and determining tax deficiencies on the basis of such evidence. Indeed, the question whether a federal tax assessment is invalid when the Internal Revenue Service's knowledge of the taxpayer's liability and its computation of the amount due are based upon evidence obtained by local police pursuant to an illegal search is currently before the Court in *United States* v. *Janis,* No. 74–958, certiorari granted, June 9, 1975.

3. The decision below is in accord with the general rule that attorneys' fees are not ordinarily recoverable. See *F. D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, 126. While there are exceptions to this

rule, they are limited to cases where there is specific statutory authority for such an award, particularly where government officers are the parties against whom recovery is sought. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 717. Here, as the court of appeals noted (Pet. App. I 4), the specific statute dealing with the subject, 28 U.S.C. 2412,[2] does not authorize but in fact precludes recovery of attorneys' fees as costs from the federal government. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* No. 73–1977, decided May 12, 1975 (slip op. 25–28); see also *Pyramid Lake Paiute Tribe of Indiana* v. *Morton,* 499 F.2d 1095 (C.A.D.C.), certiorari denied, 420 U.S. 962

For the reasons stated, the petition for a writ of certiorari, as it pertains to the federal respondents, should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975

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[2] 28 U.S.C. 2412 provides as follows:

"**Costs.** Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States."

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